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AUTHOR Ahearn, Eileen M.

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AVAILABLE FROM National Association of State Directors of Special Education, 1800 Diagonal Rd., Suite 320, Alexandria, VA 22314. Tel: 703-519-3800; Tel: 703-519-7008 (TDD); e-mail: carla@nasdse.org. For full text: http://www.nasdse.org/forum.htm.

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ABSTRACT

A survey was conducted on the use of lay advocates to investigate state reaction to a recent court decision in Delaware on the use of lay advocates and the availability of representation for parents of students with disabilities in due process hearings. The Delaware Supreme Court found in 1999 that lay advocates representing parents at due process hearings were guilty of practicing law without a license. Data from the survey indicate states do not gather formal information about the availability and use of attorneys or non-attorney advocates to assist parents in due process hearings. Many respondents expressed difficulty in answering survey items because data on parent representation at hearings are not compiled. Survey results on state practices related to the involvement of lay advocates in due process hearings do reveal that their use varies from state to state. Only 6 states indicated that there was an insufficient number of attorneys available for parents, regardless of cost, in more than 60 percent of their state, while 15 states indicated that over 60 percent of their state lacked sufficient reduced cost or free attorney services. Very few states indicated that they had taken any specific action in response to the Delaware decision. (CR)

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NATIONAL ASSOCIATION OF STATE DIRECTORS OF SPECIAL EDUCATION

QUICK TURN AROUND

PROJECT FORUM

QTA – A BRIEF ANALYSIS OF A CRITICAL ISSUE IN SPECIAL EDUCATION

THE INVOLVEMENT OF LAY ADVOCATES IN DUE PROCESS HEARINGS

OCTOBER 2001

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Quick Turn Around

Project FORUM

QTA – A brief analysis of a critical issue in special education

The Involvement of Lay Advocates in Due Process Hearings

October 2001

Eileen M. Ahearn, Ph.D.

Introduction

The due process provisions of the Individuals with Disabilities Education Act (IDEA) guarantee the right of any party to a hearing to be "accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities" [34 CFR §300.509(a)(1)]. This phrase has been the focus of litigation in which charges of unauthorized practice of law were brought against advocates who represented families of children with disabilities in Delaware. Project FORUM at the National Association of State Directors of Special Education (NASDSE), under its Cooperative Agreement #H159K70002 with the U. S. Department of Education Office of Special Education Programs (OSEP), worked with Perry Zirkel, University Professor of Education and Law at Lehigh University in Bethlehem, PA, to examine this issue through a survey of state directors of special education.

The survey on the use of lay advocates was designed to gather information about state reactions to the Delaware decision and about the availability of representation for parents in due process hearings. This survey was sent to each State Director of Special Education in March 2001. A total of 44 responses were received that included 43 states and the District of Columbia. After a short background explanation of the issue, this report contains a brief analysis of the results of the survey and a summary of the response data for each item.

Background[1]

In 1977, Marilyn Arons founded the Parent Information Center of New Jersey, Inc. (the "Center"), which is a non-profit organization that provides "advice, counseling and advocacy services" to parents of children with disabilities. Neither Arons nor Ruth Watson, who is the executive director of the Center, is an attorney. The Center, which works with parents also in New Jersey, has represented parents of children with disabilities at due process hearings in Delaware on five occasions. In 1996, Delaware's Office of Disciplinary Counsel filed a complaint against Arons, Watson, and the Center (the "parent advocates") with the Board on the Unauthorized Practice of Law for practicing law without a license when they represented parents at due process hearings in Delaware.

[1] The background information was summarized from an article in preparation by M. Kay Hennessy, a graduate assistant at Lehigh University, who works with Perry Zirkel.

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On September 24, 1999, the Board issued its decision that the parent advocates had engaged in the unauthorized practice of law. On appeal, the Delaware Supreme Court affirmed the Board's decision. One point the court used to support its conclusion was the U. S. Senate Conference Report on the original passage of P. L. 94-142. The wording of that report separated the "right to counsel" (that is, representation by an attorney), from "the right to be advised and accompanied by individuals with special knowledge, training or skills" as evidence that Congress did not intend to confer the same authority to "represent" parents to both attorneys and individuals with specialized training. [S. Conf. Ref. No. 94-455 (1975)].

The court also determined that IDEA provides sufficient procedural safeguards without authorizing lay advocates to represent parents' interests. The parent advocates subsequently asked the United States Supreme Court to consider the decision, but their petition was denied and the Delaware decision was allowed to stand. Thus, the issue has not been finally decided by the United States Supreme Court or Congress, and states must still address: 1) whether their state will follow the Delaware Supreme Court's interpretation that the IDEA does not authorize lay advocates to represent parents at IDEA due process hearings and, if so, 2) whether their state law authorizes or should authorize lay advocates to represent parents at due process hearings.

Analysis of Survey Results

The first item in the survey asked whether states had responded to the decision in the *Arons* case and, if so, what action was taken. The other four items were designed to provide a snapshot of the supply of attorneys and lay advocates for parents in each state. The total responses for each item are listed at the end of this document. The remainder of this section contains an overview of those responses and a discussion of the additional comments provided by the respondents.

Response to the Delaware Decision

Very few states indicated that they had taken any specific action in response to the Delaware decision. Of the four states that gave an affirmative answer to the first item, one has discussed the matter with hearing officers and with the office of the attorney general, a second intends to seek an opinion from its State Bar Committee on this issue and the remaining two indicated that no notable action has been taken.

The remaining 40 states have not taken specific actions in response to the decision. Six of those states added comments concerning state positions and/or practices related to the involvement of lay advocates in due process matters. One respondent expressed the opinion that there is no need to respond to another state's decision that was based on that state's laws. Another offered the opinion that it would be of more concern if parents were *required* to use attorneys since many, if not most, parents do not have access to resources necessary to acquire an attorney who is knowledgeable in special education law.

Two states indicated that they have policies banning the use of lay advocates to represent parents that preceded the Delaware decision:

- Based on a Nebraska Supreme Court case, non-attorney advocates representing parents in due process hearings in that state would be engaging in the unauthorized practice of law.
- In Tennessee, hearing officers have adopted an operational policy that

non-attorney advocates are not allowed to represent parents at due process hearings.

In contrast, two other states indicated some support of the use of lay advocates:

- The New Jersey respondent indicated that, based on a state case (Arons v. Board of Education 1988), the policy has been adopted that lay advocates may represent parents but they must first apply to the Administrative Law Judge for approval. The decision at the appeals level in that 1988 New Jersey case stated that lay advocates are permitted to accompany and provide advice to parents and that, while advocates may not receive fees for legal services, they have a right to be paid for their educational expertise [IDELR, 559:355].
- The New Hampshire respondent noted that their special education regulations specifically support the involvement of lay advocates. (Note: A review of state regulations revealed that many other states have incorporated the federal language discussed above in the introduction to this document into their state special education regulations.)

The one other comment from the group of states that have not taken specific actions in response to the Arons decision was from Iowa. The state has provided $60,000 in start-up funding for The Legal Center for Special Education, a private non-profit corporation, that provides low-cost legal services for parents as its first and primary mission. It is anticipated that the Center, which has completed a viability study and is in the process of becoming fully operational, will be a significant resource to parents for affordable legal services.

Availability of Attorneys

Two survey items sought the perceptions of state staff about the availability of attorneys to represent parents in due process hearings. One asked for the percentage of the state that has an insufficient number of attorneys regardless of cost, and the other asked about what percentage of the state has an insufficient number of attorneys available on a reduced cost or pro bono basis.

Only six states indicated that there was an insufficient number of attorneys available for parents regardless of cost in more than 60 percent of their state, while 15 states indicated that over 60 percent of their state lacks sufficient reduced cost or free attorney services. For both items, approximately one-fourth of the respondents did not choose one of the given answers. Some of these states said they did not know, one added that the number appears to be enough, and another said that there is no data on this. Comments offered for these two items were mostly duplicative of each other. The New Jersey respondent noted that there are sufficient attorneys in that state to represent parents at hearings, but observed that the parameters of the item were too ambiguous and that the state has no means to determine whether the lack of parent representation is by choice or lack of availability. The Iowa respondent indicated that few parts of the state have a sufficient number of attorneys available to provide competent representation for parents.

Availability of Non-Attorney Advocates

Two items asked for the views of state staff about the availability of non-attorney advocates. One asked for respondents' judgments on the level of availability of lay advocates in the areas of the state where

there are not enough attorneys. Only Hawaii responded that they are fully available, and Montana indicated that lay advocates are substantially available in their state. More than half of the states responding to this item described the availability of such services as sporadic or negligible, while eight states reported that lay advocates are moderately available. About 30 percent of the respondents did not indicate a choice for this item. One of them—Iowa—commented that the availability of non-attorney advocates is a strength in the state as a result of the work of the Parent Information and Training Center and other groups. However, the Iowa respondent added that the parents are not trained to pursue due process actions and lack credentials, experience and/or authority to represent parents. New Jersey commented that every parent has access to the Statewide Parent Advocacy Network that provides advocates to appear on behalf of parents, but this cannot be represented in percentages since data is not available on how many choose not to use an advocate or why.

Thirteen states responded that they did not know or had no way to determine a response to the item that asked respondents to indicate in what percentage of their state non-attorney advocates are available to represent parents on a reduced cost or pro bono basis. Only four states indicated that this resource is available in over 61 percent of their state while in 17 states, the availability is 20 percent or below.

Additional Comments

Respondents were asked to add any other information they could share about the availability of legal services for parents as affected by factors such as urban vs. rural, language barriers, etc. Comments from 15 states addressed the following areas:

- Attorneys able to represent parents are generally more available in urban areas than in rural parts of states.
- A few states indicated that geography is not the major barrier. Low levels of knowledge and expertise in special education is what limits the availability of attorneys for parents in hearings.
- Anecdotal evidence suggests that the lack of free or low-cost legal service deters parents from initiating hearings.
- Decisions to use attorneys seem to be influenced more by the level of parent sophistication than by geography.
- Parents may not report shortages, but they have often indicated problems with the schedules of attorneys.
- Sometimes there is an adequate supply of attorneys, but they are not always willing to represent parents of children with disabilities on a free or low-cost basis.

Discussion

A search of the National State Policy Database[2] revealed that two-thirds of the states have included in their special education regulations the same or almost the same wording as the IDEA law and regulations (i.e., the right of parents to be accompanied and advised at a hearing by individuals with special knowledge or training with respect to the problems of children with disabilities). In 14 states, no such specific provision exists, but the federal provision applies even if it is not

[2] The National State Policy Database (NSPD) is a full text searchable database maintained jointly by NASDSE and the Regional Resource Center Network that contains the special education regulations for 43 states. It is available on the internet at: www.glarrc.org/Resources/NSPD.cfm

specifically mentioned in a state's regulations.

Data from the lay advocates survey indicate that states do not gather formal information about the availability and use of attorneys or non-attorney advocates to assist parents in due process hearings. Many respondents expressed difficulty in answering some survey items because specific data on parent representation at hearings are not compiled. The results of the survey on state practices related to the involvement of lay advocates in due process hearings does reveal that their use varies from state to state. Some states reported a shortage of affordable legal and/or advocacy services, while others described community or statewide resources that are designed to address such needs.

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Survey Data

Item 1: In a recent case, Matter of Arons, 32 IDELR 253 (Del. 2000), the Delaware Supreme Court barred non-attorney advocates from representing parents of children with disabilities at due process hearings under the Individuals with Disabilities Education Act (IDEA).

a) Has your state responded to this decision to prevent non-attorney advocates form representing parents at due process hearings?

4	Yes
40	No

b) If you responded Yes, what action has your state taken?

__	*it has enacted legislation*
__	*it has enacted regulations*
__	*legislation is pending*
__	*regulations are pending*
__	*a pertinent court decision followed* Arons
__	*a pertinent case is pending*
2	*our state has taken no notable action*

Item 2: In relation to the level of demand for these hearings and appeals, what percentage of your state has an insufficient number of attorneys available, regardless of cost, to represent parents at due process hearings under the IDEA?

0%	16
1% to 20%	6
21% to 40%	1
41% to 60%	3
61% to 80%	2
81% to 100%	4

Item 3: In those portions of the state where attorneys are not available to represent parents, regardless of cost, to what extent are non-attorney advocates who possess specialized knowledge available to represent parents at due process hearings under the IDEA?

fully available	1
substantially available	1
moderately available	8
sporadically available	12
negligibly available	7

Item 4: What percentage of your state has an insufficient number of attorneys available to represent parents on a reduced cost or pro bono basis?

0%	6
1% to 20%	7
21% to 40%	2
41% to 60%	3
61% to 80%	8
81% to 100%	7

Item 5: In what percentage of your state are non-attorney advocates who possess specialized knowledge available to represent parents on a reduced cost or pro bono basis?

0%	7
1% to 20%	10
21% to 40%	7
41% to 60%	3
61% to 80%	1
81% to 100%	3